

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Xcel Energy Services, Inc.  
Southwestern Public Service Company  
Oklahoma Gas and Electric Company  
American Power Service Corp.  
Public Service Company of Oklahoma  
Southwestern Electric Power Company

Docket Nos. QM07-5-000  
QM07-5-001

(Issued January 25, 2008)

Attached is the statement by Commissioner Kelly dissenting in part to an order issued on January 22, 2008 in the above-referenced proceeding. *Xcel Energy Services, Inc., et al.*, 122 FERC ¶ 61,048 (2008)

Kimberly D. Bose,  
Secretary.

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Kelly, Commissioner, *dissenting in part*:

In the Energy Policy Act of 2005, Congress reaffirmed its commitment to the Public Utility Regulatory Policies Act of 1978 (PURPA) and concluded that utilities' purchase obligations under PURPA should remain in place unless utilities meet the applicable tests established in PURPA section 210 (m).<sup>1</sup>

Applicants here seek to eliminate PURPA purchase obligations in the Southwest Power Pool, Inc. (SPP) region under PURPA section 210(m)(1)(B). In order to do so, they must prove that qualifying cogeneration and small power production facilities (QFs) in this region have nondiscriminatory access to:

- (i) transmission and interconnection services . . . provided by . . . [SPP] and administered pursuant to [SPP's] open access transmission tariff that affords nondiscriminatory treatment to all customers; and
- (ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected.

With respect to proving (i), above, the Commission, in Order No. 688, established a rebuttable presumption that QFs in the SPP region have such access.<sup>2</sup> However, in this

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<sup>1</sup> 16 U.S.C. § 824a-3(m) (Supp. V. 2005).

<sup>2</sup> *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233, at P 164 (2006), *order on rehearing*, Order No. 688-A, 72 Fed. Reg. 35,872 (2007), FERC Stats.

order, the Commission finds that Protesters<sup>3</sup> have provided evidence of operational constraints that rebut the presumption that QFs within Southwestern Public Service Corporation (SPS) have nondiscriminatory access to the necessary transmission services to access the markets within the SPP region. Therefore, the Commission denies Xcel Energy Services Inc.'s application on behalf of SPS to terminate the mandatory purchase obligation. I agree with this outcome. However, I disagree with the order's finding that the other Applicants<sup>4</sup> have met their burden of proof with respect to (ii) above. On the contrary, I find that the evidence submitted by Protesters undermines the persuasiveness of the Applicants' evidence. Since Protesters render Applicants' evidence unpersuasive, Applicants have failed to satisfy their affirmative obligation to prove the existence of the conditions required in PURPA section 210(m)(1)(B)(ii), i.e., that QFs in SPP have "nondiscriminatory access to . . . competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales to buyers other than the utility to which the QF is interconnected." For this reason, I dissent in part from this order.

This case primarily involves questions of fact. They include (1) whether SPP has competitive wholesale capacity markets (including long-term and short-term) and competitive wholesale energy markets (including long-term, short-term and real-time); (2) whether QFs located in SPP have a meaningful opportunity to sell in each of these markets; and (3) whether QFs located in SPP have a meaningful opportunity to sell in each of these markets to buyers other than the utility to which the QF is interconnected.

Applicants' evidence consists of the Affidavit of Dr. William H. Hieronymus and Dr. Mathew E. Arenchild and accompanying exhibits.<sup>5</sup> Protesters' evidence consists of the Affidavit of David A. Freeman and accompanying exhibits,<sup>6</sup> and the Affidavit of Dr.

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& Regs. ¶ 31,250 (2007), *appeal pending sub nom. American Forest & Paper Assoc. v. FERC*, D.C. Cir. No. 07-1328; *see also* 18 C.F.R. § 292.309(g) (2007).

<sup>3</sup> Protesters include PowerSmith Cogeneration L.P.; American Wind Energy Association (AWEA); Electric Power and Supply Association (EPSA); Outland Renewable Energy, LLC; Calpine Corporation; North Texas Wind Center, LLC; Noble Environmental Power, LLC; Golden Spread Electric Cooperative; Chermac Energy Corporation; John Deere Renewables, LLC; JD Wind; Wind Coalition; Acciona Wind Energy USA, LLC; and Euris Energy America Corporation.

<sup>4</sup> Oklahoma Gas & Electric Company (OG&E) and American Electric Power Service Corporation (AEP), on behalf of Public Service Company of Oklahoma (PSO) and Southwestern Electric Power Company (SWEPCO).

<sup>5</sup> Application to Terminate the Requirement to Enter into New Contracts or Obligations with Qualifying Facilities, Attachment A.

Peter Fox-Penner and Dr. Romkaew Broehm and accompanying exhibits.<sup>7</sup>

As summarized below, Applicants presented a prima facie case through the Affidavit of Dr. Hieronymus and Dr. Arenchild and accompanying exhibits. Prima facie evidence is

[e]vidence good and sufficient on its face; such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient. Prima facie evidence is evidence to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence.<sup>[8]</sup>

In this case, however, as summarized below, the evidence presented by Protesters through the Affidavits of David A. Freeman and Dr. Fox-Penner and Dr. Broehm and accompanying exhibits, contradicts and rebuts much of Applicants' evidence. There is no evidence, obtained through cross-examination or otherwise, that either the claims of Applicants or the claims of Protesters lack credibility. Herein lies the problem: the cases are equally credible on their faces.

In a situation such as this, the law dictates that Applicants' case must be dismissed for failure to satisfy their burden of proof. The decision maker (the Commission, in this case) cannot rationally prefer the Applicants' factual assertions over Protesters', or vice versa. To impute more credibility to one version of the facts than to another (without more process designed to determine which facts are more credible) is to act arbitrarily and capriciously. Although the result of equal treatment is that the Applicants' case fails, it does not fail on the merits; rather it fails because the statute has put the burden of proof on Applicants and, when their prima facie case is credibly contradicted and no subsequent process is available to them to prove credibility, they cannot satisfy that burden. It might be said that the lack of process is stacked against the Applicants; however, that is how Congress designed the statute.

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<sup>6</sup> PowerSmith Cogeneration Project, L.P. Nov. 21, 2007 Protest, Docket Nos. QM07-5-000, 001, Appendix A, Affidavit of David A. Freeman (Freeman Affidavit).

<sup>7</sup> The American Wind Energy Association and the Wind Coalition and Protest in Opposition to Application for PURPA Relief of The American Wind Energy Association, the Wind Coalition, John Deere Renewables, LLC, Acciona Wind Energy USA LLC and Euris Energy America Corporation Nov. 21, 2007 Motion to Intervene, Docket Nos. QM07-5-000, 001, Exhibit 1, Affidavit of Dr. Peter Fox-Penner and Dr. Romkaew Broehm.

<sup>8</sup> *Black's Law Dictionary*, 1071 (5th ed. 1979).

This need not be the case, however, because the Commission could easily remedy the situation. Although the Commission declined in Order No. 688 to provide for a hearing because of the 90-day time frame in which it must issue a final order in these cases, an expedited hearing procedure could, in fact, be established for these types of cases that would still allow the Commission to issue a final order within 90 days. Commission procedural regulations already provide for fast track hearing procedures for expedited hearings of complaints before an administrative law judge (ALJ).<sup>9</sup> In turn, the Commission's Office of Administrative Law Judges has adopted procedures to implement this fast track process that provide for hearings within as few as three days of the Commission order setting the hearing and an initial decision within as few as eight days.<sup>10</sup> Similarly, it seems that the Commission could implement a fast track process for applications under PURPA section 210(m), providing Applicants and Protesters with an opportunity to test the credibility and validity of each others' evidence. Given the factual issues on which these cases necessarily turn, I believe such a procedural improvement is warranted.<sup>11</sup>

### **Applicants' Prima Facie Case**<sup>12</sup>

Applicants provide evidence of transactions in each of the five product markets in the SPP region to show that these markets are competitive and that there is a meaningful opportunity for QFs in SPP to sell in these markets. They also provide evidence of participation of QFs and independent power producers (IPPs) in SPP markets. They also include data on requests for proposals (RFPs) issued by entities in SPP over the last four years to show that QFs have the opportunity to make short-term and long-term energy and capacity sales through the award of RFPs. They calculate a Herfindahl-Hirschman Index (HHI) of less than 400 for SPP, and they list over 350 potential buyers of power in the SPP region. The following is a summary of that evidence.

#### **1. Real-time energy market**

SPP has had an Energy Imbalance Service (EIS) market since February 2007. In the first six months of its operation, between eight and nine percent of the market

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<sup>9</sup> 18 C.F.R. § 385.206 (2007).

<sup>10</sup> See FERC Office of Administrative Law Judges Policies and Procedures Manual, § 2.36, Attachment A (2008), *available at* [www.ferc.gov/legal/admin-lit/time-sum.asp](http://www.ferc.gov/legal/admin-lit/time-sum.asp).

<sup>11</sup> I also believe an Applicant has the legal right to waive the 90 day requirement, since this is a procedural provision intended to benefit Applicants.

<sup>12</sup> This summary is taken from the Affidavit of Dr. Hieronymus and Dr. Arenchild and accompanying exhibits.

participants' total energy requirements have been met through this market. Numerous IPPs and at least one existing QF are actively participating in this market, as are the major load-serving entities in SPP.

## **2. Short-term energy market**

Electronic Quarterly Report (EQR) volumes show that short-term energy sales served about 24 percent of SPP's energy requirements in 2006. Of this amount, non-firm energy sales met roughly 12 percent of SPP's load, with total sales reported of about 20,200 GWh. Firm energy sales in 2006 met roughly 12 percent of SPP's load. In 2006, more than 50 sellers reported short-term energy transactions to about 200 buyers where the energy was physically delivered to one of SPP's balancing authority areas. Applicants state that the SPP market concentration of buyers in this market (and the capacity market) as measured by the HHI is low, reflecting a competitive market.

Applicants point out that there are opportunities to participate in numerous RFPs to sell short-term energy on a stand-alone base and in conjunction with capacity sales.

## **3. Short-term capacity markets**

Applicants state that there were over 40 RFPs issued since 2004 requesting between 3,600 to 14,500 MW of short-term capacity in and around the SPP region. There is historical evidence of generating facilities selling short-term capacity, including to buyers located outside the balancing authority where the generator is located. Short-term capacity sales equaled about three percent of peak load in 2006. There are also about 1,550 GWh of short-term energy sales reported in the EQRs as Unit Power sales, which is a transaction defined as including energy and capacity.

## **4. Long-term energy markets**

Applicants state that long-term energy sales in 2006 accounted for roughly nine percent of SPP's energy requirements. There was a total of 15,200 GWh of energy sales for physical delivery. There were over 200 buyers reporting purchase of long-term energy. There are also significant volumes of RFPs requesting long-term energy (as well as capacity for much of the volumes).

## **5. Long-term capacity market and RFPs**

Applicants state that (1) there were over 50 RFPs issued since 2004 requesting 5,000 to 15,500 MW of long-term capacity in and around SPP's region; (2) there are numerous examples of generators signing long-term contracts with various third-parties, including contracts with buyers located outside of the balancing authority where the generator is located; (3) they estimate that long-term capacity sales made up about 13

percent of the SPP regional transmission organization (RTO) peak load in 2006 (about 5,000 MW at peak).

Applicants state that existing and potential QFs have the opportunity to make short-term and long-term energy sales as well as short-term and long-term capacity sales by participating in RFPs issued by entities in SPP and in nearby regions. Since 2004, RFPs soliciting a total of between 11,600 and 23,500 MW have been issued. Many of the RFPs specifically requested renewable generation or wind generation and many are either for relatively small quantities or allow for multiple smaller offers to be awarded up to the amount of the solicitation.

## **6. Participation by existing QFs and IPPs**

Applicants reference four IPPs and a QF that have sold power to buyers other than their host utilities in the SPP markets: Eastman Cogeneration, L.P., Green Country LLC, HCPP, Redbud, and Oneta Energy Center.

## **7. HHI**

Applicants calculate an HHI of less than 400, showing a low concentration risk in the SPP market.

## **8. Potential buyers of power**

Applicants list over 350 different entities that can be identified as potential purchases of supplies from resources eligible for QF status.

### **Protesters' Case**<sup>13</sup>

Protesters provide evidence that contradicts and rebuts much of the Applicants' evidence regarding the competitiveness of the five product markets in the SPP region; the meaningfulness of the ability of QFs and IPPs to sell in these markets; the evidence of participation of QFs and IPPs in these markets; the RFP data and its relevance; the HHI for SPP; and the list of potential buyers of power in the SPP region. They also provide data on RFPs issued by entities in SPP over the last four years to show that QFs have the opportunity to make short-term and long-term energy and capacity sales through the award of RFPs. They also present evidence of wholesale market problems in SPP that

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<sup>13</sup> The summary in this section is taken from the Affidavits of David E. Freeman, and Dr. Fox-Penner and Dr. Broehm and accompanying exhibits. Given that this order rejects the application of Xcel on behalf of SPS, I have not included a summary of Applicants' or Protesters' arguments or factual evidence regarding SPS.

Applicants did not address in their evidence. The following is a summary of that evidence.

### **1. Real-time energy market**

Protesters note that SPP's real-time energy market, the EIS market, differs from all other real-time energy markets in the U.S. in two respects, which lessens the competitiveness of the market and undercuts the meaningfulness of QFs' opportunity to sell in it. The first difference is that SPP is not responsible for the balancing of load and resources within the region. Rather, the operator of each balancing authority area remains responsible for the balance of load and resources within its balancing authority area boundary, including a determination of unit commitment schedules for its balancing authority. When each balancing authority schedules its own unit commitments, it is possible that generating resources will be overly committed in the market. Some of these resources may have not been committed if the market had a single unit commitment due to their relatively high start-up costs and certain operating characteristics. Once units are committed, however, they are likely to bid at low prices so they can be dispatched for shortfalls of energy imbalance. As a result offers from other suppliers would not be accepted. Second, SPP's current EIS tariff contains a restrictive tariff provision that imposes a high financial burden on generators outside the SPP footprint, which limits external generators participation in the EIS markets, reducing the liquidity in the market and making it more vulnerable to the exercise of market power.

Protesters also point out there is only a real-time balancing market, not a real-time ancillary services market, which adversely impacts the competitiveness of the real-time market in SPP.

Finally, Protesters assert that SPP's real-time market does not use a market-based congestion management system or provide opportunities for market participants to hedge against congestion, which decreases the competitiveness of the real-time market.

### **2. and 3. Competitiveness of SPP's short-term energy and capacity market**

Protesters state that SPP's bilateral day-ahead market for electricity delivered in "North SPP" has such a low average daily volume of trades that it is illiquid. They state that Intercontinental Exchange® (ICE) does not report the SPP price index and Bloomberg recently discontinued reporting the North SPP day-ahead price index because the market is too illiquid. They state that it is illiquid under the definition used by the Commission in its *Order Regarding Future Monitoring of Voluntary Price Formation, Use of Price Indices in Jurisdictional Tariffs, and Closing Certain Tariff Dockets*.<sup>14</sup> This

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<sup>14</sup> *Price Discovery in Natural Gas and Electric Markets*, 109 FERC ¶ 61,184 (2004).



illiquidity renders these markets non-competitive. The lack of liquidity is even more apparent if one compares it to the liquidity of other short-term markets, such as the Electric Reliability Council of Texas' (ERCOT) bilateral day-ahead market.

### **3. and 4. Competitiveness of SPP's short-term and long-term energy markets**

Protesters rebut Applicants' reliance on EQR data to determine whether these SPP markets are competitive and provide QFs with a meaningful opportunity to sell. Protesters point out numerous shortfalls in the Applicants' use of EQR data, including (1) failing to distinguish between QF and non-QF transactions, and (2) erroneously assuming an unconstrained SPP-wide market. Protesters state that conditions in the electricity market must be assessed not only by relevant market but also by time period (e.g., on-peak, off-peak, and seasons), and in the absence of such data, the Commission has inadequate information regarding the actual ability of QFs to make shorter-term sales in, for example, peak periods when it may be most economically beneficial for QFs to sell. Protesters say the undifferentiated EQR data presented by Applicants should not be relied upon because it over-amplifies both SPP's market activities and the opportunities for sales that a QF may have. Protesters point out that the Commission does have disaggregated EQR data that the Applicants can access for better analyses.

### **5. RFPs**

Protesters state that self-managed power procurement efforts in the form of RFPs have existed long prior to competitive market developments, and they exist in regions such as the Southeast, West and Northwest where power market competition is tepid. Therefore, Protesters assert that RFPs are not necessarily reflective of a competitive wholesale market.

Protesters state that most of the 74 RFPs relied on by Applicants for the proposition that this market provides opportunities for QFs have very specific terms and conditions and that Applicants have not shown that most QFs in SPP would qualify under these terms and conditions. They assert that some of the specific terms and conditions in the RFPs include requirements on having firm or network transmission service reservations, specific plant locations, and type of generating resources. They note that many of the RFPs sought specific types of power plant technologies, such as combined cycle and peaking facilities. Protesters contend that intermittent QFs such as wind would not be qualified to participate in such RFPs.

Protesters state that only 12 of the 74 RFPs specifically solicited renewable resources. They assert that several of these RFPs also required that renewable power facilities be located in certain states. They contend that one required that eligible renewable resources be located in North or South Dakota and one required that the renewable resource be from Kansas. They say that one required that it be from "a new

facility”. Protesters state that one required that qualified bidders be interconnected with Midwest Independent Transmission System Operator (MISO) and be able to pass the MISO deliverability test. They assert that one stated a preference for generation resources located in East Texas. Protesters state that if the RFPs with these types of requirements are excluded from the list of 74 RFPs, wind QFs would qualify for only six of the 74, for a total solicited quantity of 574 to 1,158 MW.

Protesters assert that the RFP data as presented by Applicants only notes three of the 74 RFPs as having winning bidders. They further note that some of the RFPs resulted in no accepted bids at all. They contend that one of the RFPs issued rejected all of the bids received and decided to build their own power plant. Finally, they state that four of five long-term RFPs issued by PSO and SWEPCO resulted in “Self Build” rather than successful bidders from third parties.

## **6. Participation by existing QFs and IPPs**

Protesters explain that the four IPPs and one QF that have sold power to buyers other than their host utilities in the SPP EIS, short-term and long-term energy and capacity markets are all natural gas-fired facilities. They assert that characteristics of combined-cycle power plants are different from wind energy facilities. They note, for example, that the former can follow dynamic schedules and provide spinning reserves. Thus, Protesters state that the examples supplied by Applicants, in addition to being “strikingly few” in number, are also inadequate to support a claim that QFs in other balancing authority areas have a meaningful opportunity to sell to buyers other than their interconnected utilities.

Protesters also point out that two of these IPPs are financially stressed. They state that Oneta is owned by Calpine Corporation, which recently underwent bankruptcy. They also contend that Redbud was originally developed by Intergen, which transferred ownership to collateralized lenders in lieu of debt repayment; in 2005, the lenders sold the positions of the distress debt/equity funds to Kelson Energy. Protesters state that, because of their financial difficulties, these plants have been motivated to sell energy and capacity to any potential market at prices close to variable costs, far lower than prices that would have generated a return on original invested equity. Thus, they say these examples are not probative.

## **7. HHI**

Protesters point out that Applicants calculated a low HHI for the SPP short-term energy and capacity market by erroneously delineating the entire SPP footprint as a relevant geographic market. They state that transmission constraints as well as Commission policy requires SPP to treat the applicable, individual SPP balancing authority area as the relevant geographic market. Thus, they conclude that the low HHIs

calculated by Applicant are not probative.

Protesters also point out that this HHI calculation relies solely on EQR data for the region, which, according to SPP, is only EIS volumes. Thus, they assert that this calculation excluded the more significant volumes attributable to this region's practice of utilities relying primarily on their own generation resources for energy supplied to their own captive ratepayers.

Protesters additionally point out that Applicants' low HHI calculation is substantially different from those of the SPP Market Monitoring Unit and Boston Pacific Co., Inc, the Independent Market Monitor of SPP who calculated HHIs for the SPP EIS market, using two methods, and arrived at much higher figures of 1134 and 1450. Protesters state that the report concludes that the 1450 score "puts [SPP] in the mid-range of the moderately concentrated range indicating a somewhat higher potential for market power abuse."<sup>15</sup> Furthermore, Protesters contend that this is just an HHI on the EIS market and does not capture any potential market power abuse in any other product markets.

## **8. Potential buyers of power in the SPP region**

Protesters state that the actual list of potential buyers of QF generated power in SPP is much smaller than the 350 listed by Applicants.

Protesters state that load service in the region is dominated by seven investor-owned utilities (IOUs). They assert that, while there are a significant number of municipal and cooperative utilities within SPP, the total load they serve is negligible compared to the IOUs' load. Also, they note that municipal and cooperative utilities join together in various joint action agencies to purchase power; what may seem like many fragmented buyers actually operates with much greater concentration. Finally, Protesters state that wholesale trading occurs in standard blocks of 50 MW. They contend that most municipalities and cooperatives and nearly all the "potential buyers" on Applicants' list are too small to purchase these larger wholesale blocks of energy. Protesters assert that, contrary to Applicants' list, the actual market of buyers for QF-generated power is limited to a handful of IOUs who are incentivized through their cost-based rates to serve their captive native load with their own generation resources and to grow earnings by investing in additional resources rather than purchase power and capacity from more competitive or environmentally desirable third-party resources.

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<sup>15</sup> Freeman Affidavit at P 13(b) (quoting Quarterly Metrics Report for the Energy Imbalance Services (EIS) Market, at 6 (July 20, 2007)).

Protesters state that, while it is theoretically possible for a QF to generate, store, and ship energy anywhere in the world, the practical reality is that QFs must target buyers of sufficient size to amortize transaction costs and within a reasonable distance of the facility to minimize transmission losses and avoid pancaked rates. Further, they state that it is practically impossible to move power from SPP, which is in the Eastern Interconnection, to the Western Interconnection or to ERCOT. Protesters assert that the Applicants' list of potential buyers includes many buyers so remote from SPP that they represent no practical potential for sales from a QF in SPP, including, for example, Manitoba Hydro (Canada); Comision Federal de Electricidad (Mexico); Cities of Redding and Pasadena and Turlock Irrigation District (California); Salt River Project and Tucson Electric Power Co. (Arizona); Indianapolis Power & Light; South Carolina Power & Light; Tacoma Power & Light and Puget Sound Energy (Washington). They note that the list also includes entities that are already "long" on energy and capacity and are therefore competitive sellers, rather than buyers. Protesters state that these include Panda Gila River, Union Power Partners, Pleasant Hill Marketing, Redbud Energy, Calpine Oneta Power, Coral Power, Sweeny Cogeneration, Manitoba Hydro, and Bonneville Power Administration.

## **9. Wholesale market problems in SPP**

Protesters note that the SPP region lacks competitive market structures and opportunities found in other regions of the U.S., including (1) real-time and day-ahead markets for ancillary services; (2) bid-based, auction market for day-ahead energy sales; (3) access to over-the-counter markets and electronic exchanges such as ICE; (4) a real-time sales market that supports a market-based day-ahead market (as in ERCOT); or (5) any market-based approach for providing long-term capacity, e.g., a capacity market administered by SPP.

Protesters explain that a number of significant characteristics common to competitive markets are not present in SPP. They state that these include:

- (1) Price indices published by independent agencies. Participants in markets with price indices are confident enough in the fair value of these indices that they are willing to buy or sell power based upon future prices published as these indices. No such price indices exist in SPP today. Platts Megawatt Daily does publish an index for the SPP-North area; however no market participant, other than the local load-serving utilities, uses this as a transfer price for physical power transactions.
- (2) Market liquidity as measured by energy (MWh) traded. Platts has reported volumes for the second quarter of 2007 for price points throughout the U.S. It reported volumes for PJM Interconnection, L.L.C. (PJM) of 321,000,000

MWh and for ERCOT of 110,000,000. In comparison, the SPP volume was only 2,000,000, one of the lowest totals of any price point.

- (3) Many market participants. Platts has reported the names and volumes of companies active for the second quarter of 2007 in various zones in the U.S. Only 11 companies are reported for SPP. In contrast, over 50 are reported active in the PJM and New York Independent System Operator (NYISO) zones.
- (4) Diverse market participants. Effectively competitive power markets must enjoy a rich diversity of market participants, including bank affiliated traders, non-utility affiliate marketers, retail-focused marketers, regionally specialized marketers, independent power projects and large industrial customers. For the second quarter of 2007, Platts shows that all but one of the SPP market participants are regulated utilities, utility affiliates, or independent power projects with assets in the region. No bank affiliated traders are reported on the "Most Active" list, a clear indication that alternative financial markets to manage long-term price risks have yet to develop in SPP. For the most part, SPP retail ratepayers are still exposed to cost-based rates by traditional, centrally-controlled, vertically-integrated, utilities. Due to the unavailability of transmission, these utilities enjoy the market control of vertical monopolies. Additionally, they also enjoy horizontal market control as they manage the bulk of supply to serve load energy, capacity, and ancillary service commercial activity within their respective control areas.
- (5) Spot and forward trades. 7,000 traders use ICE nearly every business day to trade gas and power. Yet, neither trade points nor products yet exist on ICE for power purchases or sales within SPP. Lack of any over-the-counter trade activity on ICE is a telling fact supporting the conclusion that SPP has not yet developed into a competitive power market.
- (6) Power market restructuring. Power markets heretofore deemed to be effectively competitive involved some form of fragmenting the oligopolistic upstream generation resources and/or retail load service that, in turn, increased the number of buyers and sellers in these markets, reduced the load-serving utilities' market power and directly caused increased market liquidity and transactions activity. This has not occurred in SPP. For example, in competitive markets such as New England and PJM, utility-owned generation is much lower than that of IPPs. In contrast, utilities own the majority of generation resources in non-competitive regions such as the Southeast, Pacific Northwest, and states within the SPP. Applicants, in tallying up the generation resources of each of the SPP Utilities (to show they need additional generation to meet load) actually emphasize that the utilities meet most of their load

through their own resources. PSO's and SWEPCO's own resources meet 96.6 percent of their load. OG&E owns resources for over 94 percent of its needs. The now-merged Missouri Public Service Co. and Kansas City Power and Light owns generation equal to 111.6 percent of its load. These figures show that the utilities can rely almost entirely on their own resources to meet their energy needs.

I believe that the summary of the evidence shows that much of the evidence relied upon by the Applicants in their *prima facie* case has been credibly questioned and contradicted by the Protesters. Protesters provide evidence that the real-time energy market in SPP is different from, and smaller than, the real-time energy markets in other regions where markets have been determined to be competitive. Further, the evidence suggests that the SPP market has rules that adversely impact its competitiveness. Protesters have credibly questioned the relevance of the EQR data relied on by Applicants to establish the competitiveness of SPP's short-term and long-term energy and capacity markets. Protesters have provided evidence to demonstrate the illiquidity of SPP's bilateral day-ahead market, which has a distinct bearing on its competitiveness. They have contradicted much of the evidence proffered by Applicants with respect to the relevance of RFPs to the competitiveness of SPP's markets and the opportunity of QFs to sell in them. Protesters have aptly questioned the relevance of Applicants' evidence of participation by existing QFs and IPPs in SPP markets. They have credibly rebutted the low HHI that Applicants calculated for SPP. Protesters have credibly diminished the list of "real" potential buyers of QF generated power in SPP to a relative few. Protesters have credibly demonstrated that SPP lacks many of the indicia of competitive markets. It may be that the Applicants could, with more process, rebut Protesters' evidence.<sup>16</sup> However, Applicants do not have such a process available to them. Given that Applicants' evidence has been credibly questioned, contradicted, even arguably rebutted, Applicants' *prima facie* evidence is insufficient to satisfy their burden of proof. Therefore, their application must be denied.

For these reasons, I respectfully dissent in part from this order.

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Suede G. Kelly

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<sup>16</sup> As noted, *supra*, my analysis here is based upon the factual evidence presented by both sides. That evidence came in the form of affidavits, with accompanying exhibits. While both Applicants and Protesters filed answers to each other's case-in-chief, they did not include any additional evidence in their answers regarding the facts at issue here (e.g., rebuttal affidavits).